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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 466

AUGUST J. LIPPI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. 31–57) is reported at 347 F. 2d 33. Memorandum opinions by the trial court (R. 36a–54a)[1] denying petitioner's motions (1) in arrest of judgment, and for acquittal or new trial in the alternative, and (2) for a new trial on the grounds of newly discovered evidence, were not reported.

[1] "R.__a" references are to petitioner's appendix in the court of appeals; "R.__b" references are to respondent's appendix in the court of appeals; "Tr." to pages of the typed transcript lodged with the Clerk; "Ex." to original exhibits lodged with the Clerk.

JURISDICTION

The judgment of the court of appeals was entered on June 21, 1965 (Pet. 58). On July 19, 1965, Mr. Justice White extended to August 20, 1965, the time for filing a petition for a writ of certiorari. The petition was filed August 19, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the conspiracy count of the indictment adequately pleaded the felony which was its object.

2. Whether, in a joint criminal tax trial of a corporation and individual defendants, post-conspiracy statements made to a federal investigator by the corporation's president can be admitted against the corporation under clear limiting instructions.

3. Whether reversible error inescapably occurs despite clear instructions to the jury where, during a colloquy on a procedural point, reference is made to the fact that a defendant has not taken the stand.

4. Whether the government's inadvertent failure to discover and furnish petitioner with one of a number of prior contradictory answers by a government witness required a new trial where the witness admitted on cross-examination that he had on several occasions given contradictory testimony on the same subject.

STATUTES INVOLVED

18 U.S.C.:

SEC. 371. *Conspiracy to commit offense or to defraud United States*

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

* * * * *

SEC. 3500 (as added by Act of September 2, 1957, P.L. 85-269, 71 Stat. 595) *Demands for production of statements and reports of witnesses*

* * * * *

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

* * * * *

Internal Revenue Code of 1954:

SEC. 7201. ATTEMPT TO EVADE OR DEFEAT TAX.

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution. [26 U.S.C. 7201.]

STATEMENT

On March 10, 1961, an indictment in seven counts was returned in the Middle District of Pennsylvania, naming petitioner, two officers and one stockholder of the Knox Coal Co. and the corporation as defendants (Pet. 59–69). Count one charged the corporation with willfully attempting to defeat and evade its income taxes for its fiscal year ending June 30, 1957, in violation of 26 U.S.C. 7201. Count two identified petitioner as president of United Mine Workers, District 1, and charged that he had violated 18 U.S.C. 371 by conspiring with the other three individuals to defeat and evade the corporation's 1957 taxes in violation of 26 U.S.C. 7201. Count three charged petitioner and the other three individuals with willfully attempting to defeat and evade the corporation's 1957 taxes in violation of 26 U.S.C. 7201. The remaining counts did not name petitioner.

Petitioner was tried jointly with the corporation

and Josephine Sciandra, a stockholder. The jury found all three guilty as charged. Petitioner was sentenced to imprisonment for three years and a fine of $5,000 on count two. Sentence on count three was suspended and petitioner was put on probation for three years. (R. 34a.)

Petitioner's interest in the Knox Coal Co. was not recorded in the corporation's stock book (Govt. Ex. 142) but a stockholders' trust agreement (Govt. Ex. 150-A) recited that petitioner owned 31% of the outstanding stock. Moreover, the evidence demonstrated that the corporation paid petitioner's insurance premiums (Tr. 724) and that he cashed dividend checks issued by the corporation to cash (Tr. 825).

The Knox Coal Co. took deductions on its 1957 tax return for the following expenses which the evidence shows it had not actually incurred (Govt. Exs. 157-159):

(1) Wages and salaries	$131,582
(2) Miscellaneous expenses	12,000
(3) Drainage expense	18,120

A former bank cashier, George Daileda, testified that the checks in the last two categories (some of which were made out to cash and some to third party payees) were cashed, without endorsement, by petitioner at the First National Bank of Exeter, of which petitioner was then an official. (Tr. 815, 817-818.)

The checks in the first category were distributed to some thirty-two persons (Govt. Ex. 158) connected by various relationships with either petitioner or the other individual defendants, including numerous

women and children, an absent soldier, elderly, retired miners, and professional teachers (Tr. 364, 358, 423, 448, 377, 301, 218, 289, 311, 324, 338, 346, 1010, 1011). The names of these people were separated from those of the regular employees on the payrolls; the total payments to the group related to each of the four individual defendants were approximately equal in amount (Govt. Ex. 158), the existence of any services rendered by these people was unknown to the company superintendents or office personnel (Tr. 26ff, 135ff.), and their performance of service was not substantiated by the "time books" normally used to record miners' services (Tr. 144, 147). (See also Tr. 229, 239, 248, 315, 324, 386, 424, 450, 494, 504.) Those payees who were in petitioner's group included his daughter, his nephew, his secretary, his secretary's wife, his brother-in-law, and three acquaintances (Tr. 364, 358, 423, 448, 377, 301, 398, 819). Petitioner cashed checks issued to at least three of them (Tr. 819, 822, 827). On the basis of this evidence the court below characterized these purported "wage" payments as "spurious" (Pet. 43).

ARGUMENT

1. Petitioner's contention that the indictment failed to charge the purpose of the conspiracy is refuted by a cursory scanning of count two which, after identifying the conspirators, alleged (Pet. 61) that they conspired

> * * * to commit certain offenses against the United States, to wit:
>
> (a) The offenses of wilfull attempts to evade and defeat, corporate income taxes of Knox

Coal Company for the fiscal year ended June 30, 1957, a felony, in violation of Section 7201 of Title 26 of the United States Code.

The Grand Jury Further Charges:

That said unlawful combination, conspiracy, confederation and agreement was to be accomplished by the means and method and in the manner following:

(1) It was a part of the plan and conspiracy that false and fraudulent payroll records for Knox Coal Company be created which would list as corporate employees persons who would not, in fact, be employees of the corporation and who would perform no services for the corporation.

(2) It was, further, a part of the plan and conspiracy that funds of Knox Coal Company be paid in the form of wage or salary payments to or in the names of persons who would not, in fact, be employees of Knox Coal Company and who would perform no services for Knox Coal Company.

(3) It was further, a part of the plan and conspiracy that Knox Coal Company on its payroll records and income tax returns for the fiscal year ended June 30, 1957, would claim Federal income tax deductions for wages or salaries paid and to be paid to or in the names of persons who would not in fact be employees of Knox Coal Company and who would perform no services for Knox Coal Company.

Thirteen overt acts were then alleged, of which the last was filing a fraudulent corporation tax return understating taxable income by $161,502, and tax by $80,445.45.

Petitioner cites *Pettibone* v. *United States,* 148 U.S. 197, where the Court found that the indictment failed adequately to allege the defendant's purpose. The instant indictment not only clearly alleges a conspiracy to willfully attempt to evade and defeat corporation taxes, but also describes at length the means to be employed.

The precision and detail required in indictments for substantive offenses are not necessary in charging conspiracy to commit those substantive offenses. *Wong Tai* v. *United States,* 273 U.S. 77, 80–81. The tax deficiency ultimately resulting was entirely speculative until the return was prepared, and the conspiracy would have been committed even if the substantive crime contemplated fell short of completion. *United States* v. *Rabinowich,* 238 U.S. 78, 86.

The use of plurals ("attempts" and "offenses") in stating the purpose of the conspiracy in paragraph (a), *supra,* apparently was inadvertent, as the stated purpose immediately descends to the singular by use of the phrase "a felony." If the plural was intended, it is pertinent to note that a conspiracy count is not duplicitous if it alleges a purpose to commit several substantive offenses. *Braverman* v. *United States,* 317 U.S. 49, 54. However, only one substantive attempt to evade was proved. At most, there was a trivial variance which in no way caused surprise or deprived petitioner of protection against further prosecution for the same offense.

2. When the case was called for trial on April 2, 1962, one defendant entered a guilty plea, and defendant Robert L. Dougherty (who was president of the Knox Coal Co.) obtained a continuance on the ground of illness. Dougherty's attorney also represented the corporation, but stated he would absent himself and that the corporation could be tried in his absence. (Tr. 5.) No request was made to sever or continue the case against the corporation, or to substitute counsel, although individual defendants present represented the entire stock ownership. (Govt. Ex. 142.) Thus the case proceeded to trial against petitioner, the corporation, and Mrs. Josephine Sciandra.

Petitioner complains about the introduction against the corporation of two admissions by its president, Robert Dougherty. At the trial a revenue agent testified that during the tax investigation he had questioned Dougherty in his capacity as president and that Dougherty had told him (1) that there were no women working on the corporation's premises but that his daughters performed services at an office in his home (Tr. 877), (2) that he gave the $12,000 in miscellaneous expense checks made out to cash to an unidentified individual (Tr. 868), and (3) that the $18,000 in drainage expense checks

> were paid to Louis Melosi and Joseph Boccaccini but that these gentlemen did not perform drainage work for the Knox Coal Company or any other services directly connected with the operation of the mine. He stated they did perform some services for the corporation, and he also stated that they were connected with the union in some manner. [Tr. 869, R. 7b]

Petitioner did not object to the first two admissions but did object to the third (R. 7b). The government's attorney stated that these admissions were offered only against the corporation (Tr. 871), and the trial judge immediately instructed the jury (Tr. 872, R. 9b):

> The jury will be instructed that this testimony has only application to the Knox Coal Company, and will have no bearing, no relation at all to the other two defendants.

In its charge, the court also instructed the jury that declarations by a particular defendant after a conspiracy is ended cannot be considered against any defendant not present when the declaration was made. (Tr. 1123.)

Petitioner is incorrect in representing that the prosecutor linked petitioner's name to the statements by Dougherty (Pet. 21). Petitioner's transcript references relate to argument on the admissibility of testimony summarizing the total wages paid to those persons related to petitioner (Tr. 881–882). The admissions did not identify petitioner. The court's instructions qualify as those "clear" instructions which a jury can reasonably be expected to follow. *Delli Paoli* v. *United States,* 352 U.S. 232, 242; *Wong Sun* v. *United States,* 371 U.S. 471, 490.

Dougherty personally signed the checks in question as well as the corporation's tax return. His attempt to justify these deductions to the revenue agent in the course of an official inquiry is thus clearly admissible against the corporation of which he was then president. *Pan American Co.* v. *United States,* 273

U.S. 456, 498–500, and cases cited therein, particularly *Aetna Indemnity Co.* v. *Auto-Traction Co.*, 147 Fed. 95, 98 (C.A. 9); *Joslyn* v. *Cadillac Co.*, 177 Fed. 863, 865 (C.A. 6); *Chicago, Burlington & Quincy R.R. Co.* v. *Coleman*, 18 Ill. 297, 298.

3. In commencing his rebuttal argument, the prosecutor stated he would reply to the closing arguments of both petitioner and his co-defendant, Mrs. Sciandra. The court interrupted as follows (Tr. 1100):

> The COURT. I don't think there is any rebuttal of Mr. Kosik's case [Kosik was petitioner's attorney]. He [petitioner] didn't take the stand. Doesn't that give him the final closing? You do have rebuttal as to Mrs. Sciandra. Don't you agree?
>
> Mr. BROWN. Yes, I believe that is so because he didn't take the stand. What the judge has just remarked, that since Mr. Lippi didn't take the stand that we will be limited in our rebuttal remarks to what Mr. Degillio had to say. So I will be more brief than I planned.

This ruling gave petitioner a distinct procedural advantage and he made no objection at this time. After all closing arguments were concluded he moved for a mistrial, which the court denied. But the judge emphatically charged the jury (R. 9b–10b, Tr. 1111, 1142):

> Now, the defendant, Mr. Lippi, did not take the stand. You will draw no inference from the fact that he did not take the stand. That is his right and his privilege. There is no burden on him to prove his innocence. By his plea of "not guilty" he had made a complete

> denial of the charge. As indicated before, the Government has the burden of proving his guilt beyond any reasonable doubt.
>
> * * * * * * *
>
> * * * I instruct you to completely disregard the statement by the United States Attorney in the rebuttal to Mr. Lippi, and the reason for that is this. The law is perfectly clear on that, that a defendant not taking the stand in his own defense, and which is his perfect right; it is nobody's business but his own as I indicated to you. He is under no obligation to take the stand; by doing that his counsel has the final—has the right to make the final address to the jury. In other words, the Government has no rebuttal. It was a slight lapse on the part of Mr. Brown and no damage was done.

In the cases cited by petitioner, the fatal remarks were *intended* to provoke critical inferences. Even in such cases federal courts have ruled that the error is rendered harmless by adequate instruction to the jury. *United States* v. *DiCarlo*, 64 F. 2d 15, 17 (C.A. 2); *Langford* v. *United States*, 178 F. 2d 48, 55 (C.A. 9), certiorari denied, 339 U.S. 938; *Robilio* v. *United States*, 291 Fed. 975, 985–986 (C.A. 6), certiorari denied, 263 U.S. 716; *Wright* v. *United States*, 108 Fed. 805, 811–813 (C.A. 5). See also, *Peden* v. *United States*, 223 F. 2d 319, 321 (C.A. D.C.), certiorari denied, 359 U.S. 971; *Knowles* v. *United States*, 224 F. 2d 168, 170 (C.A. 10); *Nolen* v. *United States*, 190 F. 2d 418, 420 (C.A. 6); *Nobile* v. *United States*, 284 Fed. 253, 255 (C.A. 3). The same court which in other circumstances has held improper argument incurable (*United States* v. *Schwartz*, 325 F. 2d 355 (C.A. 3))

has evaluated the colloquy herein as bereft of prejudicial intent or content. This judgment seems correct beyond question.

This incident could not have been understood by the jury as critical of petitioner's election not to testify. His counsel conceded the remarks were factual and not uttered in any critical sense (Tr. 1106) and the belated request for a mistrial confirms this contemporaneous concession. Unlike *DeLuna* v. *United States*, 308 F. 2d 140 (C.A. 5), the jury convicted *both defendants*, including the one who testified.

Finally, prompt objection is a requisite to such a complaint. *Milton* v. *United States*, 110 F. 2d 556 (C.A.D.C.). Petitioner's counsel raised no objection until after all closing arguments had been completed.

4. Petitioner also claims that he was prejudiced because the government failed to produce a statement given by a government witness to a different government investigator in an investigation of a different company. Government witness George Daileda testified that petitioner had cashed many checks which were made out to cash or other payees. Pursuant to demand under 18 U.S.C. 3500 the government produced the Special Agent's memorandum of an interview with Daileda about these checks (Tr. 837; R. 3b–4b). Moreover, Daileda had previously testified before the grand jury and in two trials (R. 50a–51a). On these previous occasions Daileda had either denied that petitioner cashed the Knox corporation checks here in question or stated that he did not remember

who had cashed them (Tr. 852-857). During cross-examination by petitioner's counsel Daileda freely admitted lying on these prior occasions (R. 47a-51a).

After the trial of the instant case petitioner was tried for an offense involving wholly different checks issued by an unrelated corporation. During that trial the prosecutor furnished petitioner's counsel with a copy of questions and answers given by Daileda to an investigator who had not been involved in the Knox Coal Co. case (R. 52a). This statement dealt with checks issued by Newport Excavating Co. (R. 52a). Question and answer No. 202 were as follows (R. 52a):

> Q. Did Mr. Lippi ever bring in anyone else's check other than his personal check? A. No.

The trial judge found that the government's failure to supply this statement to petitioner during trial of the instant case was inadvertent (R. 52a), and that even if the answer could conceivably be interpreted as relating to the Knox checks, it was merely repetitious of the inconsistent statements petitioner's counsel already knew about. (R. 54a). He thus denied a motion for a new trial based on the newly discovered statements (R. 55a). This ruling was a sound exercise of the judge's discretion.

Forearmed with knowledge of Daileda's contradictory testimony in prior public trials, possessed of the Special Agent's interview memorandum, and assured by the prosecutor that Daileda's grand jury testimony was of a piece with his false testimony in the prior public trials (Tr. 841), petitioner's counsel ex-

haustively cross-examined Daileda and gained admissions from him of prior inconsistent statements.

Under the most favorable interpretation this answer could add nothing material to the impeaching evidence already known to defense counsel. His lack of access to it was not prejudicial to petitioner. *Rosenberg* v. *United States,* 360 U.S. 367, 371, *Killian* v. *United States,* 368 U.S. 231, 243; *Ogden* v. *United States,* 303 F. 2d 724, 737 (C.A. 9). A new trial for newly discovered prior contradictions may be denied where they are merely cumulative to prior contradictions demonstrated in the trial. *Simmons* v. *United States,* 308 F. 2d 324, 325–326 (C.A.D.C.); *United States* v. *Rutkin,* 208 F. 2d 647, 654 (C.A. 3). See also, *Slappey* v. *United States,* 110 F. 2d 528 (C.A. 5); *United States* v. *Garrison,* 296 F. 2d 461 (C.A. 7), certiorari denied, 369 U.S. 804.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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